BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS OF THE COURT BELOW.

There are two opinions of the Minnesota Supreme Court in the present case. The first, filed on February 16, 1940, and reproduced at R. 1397, *et seq.* affirmed the order of the trial Court denying petitioner's motion in the alternative for judgment or a new trial. This opinion (not yet officially reported) may be found in 290 North Western Reporter at p. 566. The second opinion, filed on April 23, 1940, affirmed the judgment of the trial Court entered pursuant to the first opinion of the Minnesota Supreme Court "for the reasons given in the previous opinion and upon authority of that opinion". The second opinion (not yet officially reported) may be found in 291 North Western Reporter at p. 610, and is reproduced herein at R. 1426.

II.

JURISDICTION.

The judgment to be reviewed was filed in the Supreme Court of Minnesota on April 29, 1940 (R. 1429).

The jurisdiction of this Court is invoked pursuant to Section 237 of the Judicial Code of the United States as amended by the Act of February 13, 1925, Chapter 229 (43 Stat. 937, 28 U. S. C. A. 205) and on the basis of the following specific claims advanced and rulings made in the lower courts:

(1) The basis of the first cause of action is a slow train movement against two cars standing alone on a two per cent

grade without brakes applied and with such lack of force when contact was made as not to effect a coupling, resulting in the court's denying petitioner its defenses of contributory negligence and assumption of risk (R. 28, 36-52, 69, 93-96, 144-148, 663-668).

Petitioner requested a charge that it did "not guarantee or insure the safety of its employes * * *. Under the evidence of this case, the so-called doctrine of assumption of risk should be applied here". The trial court denied those requests (R. 1303) and charged the jury that if the "defendant was negligent by reason of non-compliance with the Act of Congress which I have read, the defenses of contributory negligence and assumption of risk are not available to the defendant" (R. 1310, 1311). Petitioner requested a charge that "if under the evidence there was a safe and a dangerous way to do the work or thing the plaintiff was in the act of doing at the time of the accident, and * * * the plaintiff chose the dangerous way * * *, he assumed the risk * * *." The trial court denied this request (R. 1305) and instructed the jury that "where the employe is charged with the duty of protecting life or property in case of an accident or emergency, he may be justified in taking chances in the performance of that duty which he would not be justified in taking if no such duty were imposed upon him. Under such circumstances he is not charged with having assumed the risk of injury * * *" (R. 1316, 1317). Petitioner excepted to the court's rulings (R. 1323, 1324) and assigned error as to all of them in the Supreme Court of Minnesota (R. 1370, 1371). That court affirmed, saying: "Other assignments of error * * * have either been disposed of by the prior appeal or require no discussion" (R. 1406).

(2) The court permitted the jury to speculate in choosing between accident attributed to violation of the Federal

Safety Appliance Act and disease on the question of proximate cause (R. 1313).

Opposed to the scintilla of evidence supporting respondent's claim that a violation of the Federal Safety Appliance Act was the proximate cause of his disability is the undenied presence of high blood pressure (R. 389-392, 626), disease of a "hypertensive type" (R. 628, 1030, 1140, 1191), arteriosclerosis and arteriosclerotic psychosis (R. 332-335, 822), and profuse gastric hemorrhaging (R. 227, 228, 244-250) causing so sluggish a circulation as to precipitate a thrombosis in the brain resulting in a stroke and psychosis (R. 817-825, 829, 830, 1026).

(3) The court, over petitioner's objections, permitted introduction of incompetent and prejudicial evidence showing sickness, poor health and hospitalization of respondent's wife and her inability to do housework, all of which directly appealed to the sympathy of the jury in such a way as to beget a wholly wrong verdict and pervert the applicable Federal Acts (R. 237, 238, 256-260).

Over petitioner's objection that questions pertaining to family responsibilities were "incompetent", the trial court permitted questions and answers as follows:

> "Q. At the time that this hearing was had was your mother then able to be about to look after it?
>
> A. No; she was in the hospital" (R. 237). "* * * No; my mother was in the hospital at the time" (R. 238).
>
> "Q. Were you in good health then?
>
> A. No, I wasn't" (R. 256).
>
> "Q. I see. And were you able at that time to get his meals and to do your own housework?
>
> A. No, I wasn't" (R. 257).
>
> "Q. Why was that?
>
> A. Why, I had been sick.
>
> Q. Yes, and were you feeling well at that time?
>
> A. No, I wasn't" (R. 258).

The rulings of the trial court were excepted to (R. 34) and error assigned thereon in the Supreme Court of Minnesota (R. 1357-1360). The latter court affirmed said assignments as requiring "no discussion" (R. 1406).

(4) Allowing judgment to be entered on a verdict corrupted by appeal to sympathy, passion and prejudice and contrary to the principle that judgment may not be based on a verdict thus tainted.

Misconduct of respondent's counsel attributed to improper and prejudicial argument was duly excepted to before the trial court charged the jury (R. 1293, 1294). Petitioner moved the trial court for a new trial on the ground, among others, that counsel's argument directly appealed to the passion and prejudice of the jury in such a way as to deprive petitioner of a fair trial and result in the return of a verdict that was excessive (R. 1330, 1376-1382). The District Court denied that motion (R. 1130, 1331, 1382, 1383). The refusal of the court to vacate the tainted verdict and grant petitioner a new trial was assigned as error on appeal to the Minnesota Supreme Court (R. 1376-1382). The Minnesota Supreme Court declared that "while the argument of plaintiff's counsel was at all times vigorous *and, as was conceded upon oral argument, was sometimes beyond the issues of the case,* we do not think that it so exceeded the permissible limits as to justify granting another trial" (R. 1406). (Italics ours.) Petitioner appealed from the judgment entered upon the reduced and tainted verdict to the Supreme Court of Minnesota. Judgment below was affirmed by final judgment of the Minnesota Supreme Court (R. 1429).

Cases believed to sustain the jurisdiction of this Court are:

St. Louis, I. M. & S. Ry. Co. v. *McWhirter,* 229 U. S. 265, 57 L. Ed. 1179;

Seaboard Air Line v. *Horton,* 233 U. S. 492, 58 L. Ed. 1062;
C. M. & St. P. Ry. Co. v. *Coogan,* 271 U. S. 472, 70 L. Ed. 1041;
N. Y. C. Ry. Co. v. *Johnson,* 279 U. S. 310, 73 L. Ed. 706;
M. St. P. & S. S. M. Ry. Co. v. *Moquin,* 283 U. S. 520, 75 L. Ed. 1243;
C. G. W. R. R. Co. v. *Rambo,* 298 U. S. 99, 80 L. Ed. 1066.

III.

STATEMENT OF THE CASE.

On June 30, 1936, respondent was employed as a switchman, sorting and selecting cars to be used in interstate commerce (R. 3, 4, 36, 37, 42, 43, 1308-1314). Cars were being switched and shunted on different tracks on a two per cent grade. The first car was stopped by hand brake at the desired point. The next two cars were shunted upon an adjoining track where they would be assembled into a train (R. 28, 36-52, 92-96, 144-147, 151, 155, 435, 663-668). Due to an unintended application of air brakes these two cars "stopped on the frog". After bleeding the air the foreman signaled the engineer to back the train in a down-hill movement against the cars standing without brakes applied and until the entire train was in the clear, so as to permit the passing of another train that would be along in about ten minutes (R. 49, 57, 435-439, 744). In executing this movement the train was slowly and cautiously moved, resulting in a very light contact and a continuous movement until the train stopped in the clear, at which time the two end cars with respondent on them were observed continuing on (R. 49, 51, 69, 93-96, 444, 648). In the process of stepping off the car upon which he was riding respondent's mackinaw jacket became caught and jerked in such a way as to tear

a piece therefrom about a square foot in size, and he fell (R. 90, 91, 103, 107, 127, 128, 137-140, 445, 648). Over petitioner's objection respondent testified that he had become unconscious (R. 289-292) but such loss of consciousness was denied by respondent to his family physician when attended for the stroke in August, 1936 (R. 828, 853).

Within a matter of seconds respondent without assistance arose to his feet and took charge of dropping the entire train of cars upon petitioner's main line (R. 91, 298).

Respondent continued at work without loss of time until August 11, 1936 (R. 91, 244, 247, 295, 298-301, 651, 652, 653). While in his home on August 10 and 11, 1936, he had two fainting spells attributed to profuse gastric hemorrhaging (R. 244-250). The family physician was called, he was hospitalized for a month, and his condition diagnosed as a stroke attributed to a thrombosis arising out of profuse gastric hemorrhaging and sluggish circulation (R. 227, 228, 248-252, 817-825, 829, 830). On October 4 and 8, 1936, respondent was thoroughly examined by another doctor of his own choosing who said "there was nothing unusual about his actions or demeanor that suggested a psychosis" (R. 387, 391, 392). On February 8, 1937, he was declared insane and committed to a State Hospital (R. 232, 574, 825). "High blood pressure" and "a slight stroke" were here confirmed by the asylum staff (R. 626) and his condition diagnosed as "arteriosclerotic psychosis" (R. 628).

Respondent admits the presence of arteriosclerosis (R. 332, 333, 390, 391, 1170-1173, 1180). He admits the profuse gastric hemorrhaging (R. 244-251). When questioned by his attending physician he denied that he had been rendered unconscious by the fall (R. 828, 853). Loss of consciousness by accident was necessary to establish traumatic insanity (R. 1115, 1116).

Evidence was adduced in this case to the effect that "in making that movement it wasn't necessary to couple onto

the cars. * * * That is what they were doing in the first place, was trying to put them down that track'' (R. 147, 151) but opposed to the last quoted testimony of a fellow switchman he creates a paradox by introducing evidence of contrary railroad practice elsewhere. Upon such contradicted practice respondent relies for the suggested negligence in his common law case (R. 149-157, 515-518). Respondent claims that petitioner's negligence was the cause of his insanity (R. 411, 412).

IV.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

1. Error in excluding petitioner's defenses of contributory negligence and assumption of risk.

2. Error in entering judgment based on a scintilla of evidence.

3. Error in the admission of testimony showing family responsibilities such as the sickness, poor health, disability and hospitalization of respondent's wife.

4. Error in allowing judgment against petitioner to be based on a verdict arrived at by appeal to sympathy and corrupted by passion and prejudice.

V.

ARGUMENT.

Point A: This Court has jurisdiction.

Respondent pleads interstate commerce and a violation of the Federal Safety Appliance Act. That the parties were engaged in interstate commerce is admitted. A violation of the applicable Federal Acts is denied.

The Acts of Congress relied on by respondent read as follows:

The Federal Safety Appliance Act, (27 Stat. 531, 45 U. S. C. A. 15):

> "§ 2. *Automatic couplers.* It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

The Federal Employers' Liability Act (35 Stat. 65, 45 U. S. C. A. 92, 379, 434):

> "§ 51. * * * Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or betwen the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect, or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."
>
> "§ 53. * * * Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."
>
> "§ 54. * * * such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The pleadings, evidence and charge of the Court are based on a controversy of a purely Federal character.

In this respect the case is identical to *St. Louis, I. M. & S. Ry. Co.* v. *McWhirter,* 229 U. S. 265, 57 L. Ed. 1179, where this Court said: "As we have seen, the pleadings in express terms exclusively based the right to relief upon the statutes of the United States, and no non-Federal ground was either presented below or passed upon. * * * While it is true, as we have said, that, coming from a State court, the power to review is controlled by Rev. Stat. § 709, *yet where, in a controversy of a purely Federal character, the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law.*" (Italics ours.)

Point B: The Supreme Court of Minnesota has decided a Federal question of substance in a way not in accord with applicable decisions of this Court.

1. *It was error to exclude petitioner's defenses of contributory negligence and assumption of risk for the reason that evidence preponderated against the claimed violation of the Federal Safety Appliance Act.*

Throughout, petitioner nas contended, that there is no causal connection between respondent's disability and the alleged negligence of petitioner under the Federal Acts referred to.

Special consideration of the facts will disclose testimony in respondent's case emphasizing that it was not necessary to effect a coupling in the work being done, and in doing the thing here claimed to violate the Federal Safety Appliance Act (R. 147, 151). The object in the mind of the switch crew "was to shove into the clear" (R. 52, 54, 58) or, as expressed by one of the switchmen, to effect a coupling at the

time wasn't the crew's "intention at all" (R. 667, 668). Under the circumstances impact contemplated by the Safety Appliance Act was not made and in the words of the foreman, the "lock blocks didn't fall * * * because we made the coupling too easy" (R. 69).

In *Atchison, T. & S. F. R. Co.* v. *Saxon*, 284 U. S. 458, 76 L. Ed. 397, 52 S. Ct. 229, this Court said: "The Supreme Court of the United States will, on reviewing the judgment of a State court, in an action under the Federal Employers' Liability Act, give special consideration to the facts in order to protect interstate carriers against unwarranted judgments. To warrant recovery under said Act negligence and its causal connection with the injury must be adequately established."

In *United States* v. *Chicago, B. & Q. R. Co.*, 237 U. S. 410, 59 L. Ed. 1023, is enunciated the rule that "* * * the controlling test of the statute's application relies in the essential nature of the work done".

In *Louisville & Jeffersonville Bridge Company* v. *United States*, 249 U. S. 534, 63 L. Ed. 757, this Court distinguished, a transfer of a train as a unit, from one railway terminal to another for delivery without uncoupling or switching out any cars, from work described as "a sorting, or selecting, or classifying of them, involving coupling and uncoupling, and the movement of one or a few at a time for short distances".

Can the "very light" contact applied in this case be considered such an impact as contemplated by the Act? In view of the character of the work being done, we think not. Yet the trial court charged that "it was the absolute duty of the defendant to equip and maintain on the cars here involved, couplers coupling automatically by impact, and if defendant failed in that duty it was negligent"; further, "if you find that defendant was negligent by reason of noncompliance with the Act of Congress which I have read, the

defenses of contributory negligence and assumption of risk are not available to the defendant'' (R. 1310, 1311). This was assigned as error (R. 1370, 1371).

2. *It was error to enter judgment based on a scintilla of evidence.*

At the conclusion of respondent's case petitioner moved for a directed verdict on the grounds that respondent failed to carry his burden of proof, failed to prove any actionable negligence, failed to eliminate existing disease as the cause of his disability and was resting his case on mere speculation and conjecture (R. 1203).

Relying upon a violation of the Federal Safety Appliance Act, respondent must of necessity prove as stated in *Lang* v. *N. Y. C. R. Co.*, 255 U. S. 455, 65 L. Ed. 729, ''a causal relation between the fact of delinquency and the fact of injury''.

The alleged violation of the Safety Appliance Act was simply one of several antecedent events, such as the catching of respondent's mackinaw jacket as he was leaving the cars (R. 127, 137, 138, 139), but such claimed violation of the Act was not in a legal sense the proximate cause of the insanity. See *St. Louis, etc. Ry. Co.* v. *Commercial Insurance Co.*, 139 U. S. 223, 35 L. Ed. 154.

After falling respondent immediately arose and describes his actions as follows: ''I walked up there about 15 or about 20 cars or so and then they pulled out. * * * I rode on the cars. * * * They * * * cut them off and I took them down a ways and stopped them with the air'' (R. 295). Respondent denied that he was rendered unconscious by the accident (R. 828, 853). In order to establish traumatic insanity he had to be rendered unconscious by the fall (R. 1115, 1116). He admits symptoms in all respects the same as those of arterial sclerotic psychosis, or in other words, senility (R. 330, 392). Nowhere

is it denied that "insanity due to trauma is very, very rare, * * * less than one-half of one per cent" (R. 977). Some three months subsequent to the fall his examining physician observed no evidence of psychosis (R. 387-391).

Manifestly the Court permitted the jury to choose between accident and disease and respondent's burden of proof is based upon a scintilla of evidence.

In *Pennsylvania R. Co.* v. *Chamberlain,* 288 U. S. 333, 77 L. Ed. 819, this Court disapproving the scintilla rule, said: "The rule is settled for the Federal courts, and for many of the State courts, that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct the jury to find according to the views of the court. Such a practice, this Court has said, not only saves time and expense, but 'gives scientific certainty to the law in its application to the facts and promotes the end of justice.' (Citing cases.) The scintilla rule has been definitely and repeatedly rejected so far as the Federal courts are concerned. (Citing cases.) Leaving out of consideration, then, the inference relied upon, the case for respondent is left without any substantial support in the evidence and a verdict in her favor would have rested upon mere speculation and conjecture. This of course is inadmissible."

To like effect see:

Chicago, M. & St. P. Ry. Co. v. *Coogan,* 271 U. S. 472, 70 L. Ed. 1041.

Gulf, M. & N. R. R. Co. v. *Wells,* 275 U. S. 455, 72 L. Ed. 370.

A. T. & S. F. Ry. Co. v. *Toops,* 281 U. S. 351, 74 L. Ed. 896.

Southern Ry. Co. v. *Walters,* 284 U. S. 190, 76 L. Ed. 239.

Chicago, G. W. R. R. Co. v. *Rambo,* 298 U. S. 99, 80 L. Ed. 1066.

3. *It was error to admit testimony showing family responsibilities such as the sickness, poor health, disability and hospitalization of respondent's wife.*

Over the objection of petitioner, respondent was permitted by the trial court to show that his wife was "in the hospital" (R. 237, 238), was not "in good health" (R. 256), was not able to do her "own housework" (R. 257) because she "had been sick" and had not been "feeling well" (R. 258).

In the case of *Pennsylvania Company* v. *Roy,* 102 U. S. 451, 26 L. Ed. 141, testimony of this character was considered reversible error, the court saying: "The court, in a manner well calculated to attract the attention of the jury, withdrew from their consideration the evidence touching the financial condition of the plaintiff; but as nothing was said by it touching the evidence as to the ages of his children, they had the right to infer that the proof as to those matters was not withdrawn and should not be ignored in the assessment of damages.

"For this error alone the judgment is reversed, and the cause remanded for a new trial."

The rule expressed in the last cited case was followed in *Southern Pacific Co.* v. *Ralston* (C. C. A. 10th Circuit), 67 F. (2d) 958, and *Chicago & N. W. Ry. Co.* v. *Kelly* (C. C. A. 8th Circuit), 74 F. (2d) 31.

The conduct here complained of was condemned by the Supreme Court of Minnesota in the first appeal reported in 203 Minnesota 312, at page 323 in these words: "The questions asked of plaintiff's wife with the obvious purpose of arousing the sympathy of the jury by showing that she was in bad health should have been excluded and the an-

swers stricken." The majority opinion in the present case makes no mention of this appeal to passion and prejudice, but the dissenting opinion does in these words: "As in the first trial counsel was careful to bring out the fact that plaintiff's wife was in poor health" (R. 1420). Through the questions and answers here permitted over petitioner's objection there was a direct appeal to the sympathy of the jury in such a way as to pervert the applicable Federal Acts and decisions of this Court. It was all the more objectionable because condemned by the Supreme Court of Minnesota upon the first appeal and closely allied with the corrupting influence discussed in our next title.

4. *It was error to allow judgment against petitioner to be based on a verdict arrived at by appeal to sympathy and corrupted by passion and prejudice.*

Scaling the heights of rhetoric and with unusual oratorical ability, counsel appealed to the sympathy, passion and prejudice of the jury in these words:

> "And I think the thing that has surprised me the most of anything in this case when Mr. Ledin, the assistant superintendent of that road, came in here before all of us and said that he felt that under those circumstances the conductor was justified in giving the come-on signal and not testing the coupling.
>
> *"I hope that if there are any grievance committee men in this court room who are hearing me now that they will call to the attention of the superintendent of the road what the assistant superintendent said in this case approving the sort of thing that was done by the conductor, Hunter. When railroad men are criticized for this kind of movement I do not believe that any railroad man will ever be guilty of that kind of a movement again"* (R. 1277). (Italics ours.)

and in the light of the prejudicial testimony permitted by the trial court relative to family responsibilities, counsel continued in these words:

> "What is liberty worth? What is the right and the ability to be self-sustaining and self-respecting worth? What is it worth to a man who has lived and worked and perspired honestly to have the realization that he is a man able to face the world and to *support his family?*" (R. 1288). (Italics ours.)

Similar conduct had been condemned by the Supreme Court of Minnesota in the first appeal reported in 203 Minnesota 312, at pp. 322 and 323 where it was said:

> "* * * These remarks suggest that counsel for the plaintiff appreciated the difficulty the jury might have in finding a verdict in his favor upon the merits and *hence this appeal to sympathy to base their verdict not upon what the plaintiff might be entitled by law to recover but upon what he needed in order to care for the invalid wife, widowed daughter, and grandchild. Sympathy may be as potent a microbe to give justice the blind staggers as may prejudice or any other improper consideration,* and had these remarks been seasonably objected to as the rules of the district court permit, the trial court would doubtless have done what it could to protect the jury from this assault upon their sympathy. The situation borders closely upon a case where the trial court should, upon its own motion, have restrained the zeal of counsel." (Italics ours.)

In the present case exception was duly taken to the prejudicial remarks of counsel and the trial court's attention directed thereto (R. 1293, 1294) and error was assigned on appeal to the Supreme Court of Minnesota (R. 1376-1382).

The trial court made no attempt to restrain the zeal of counsel and did nothing to correct the error by proper instruction to the jury. Subsequent to the return of the

verdict, the court acknowledged that "the argument complained of might better have been omitted" but proceeded to condone it because "uttered in the heat and enthusiasm of argument" (R. 1394); the Court's uneasiness about the improper argument is reflected in these words: "I feel that the verdict is somewhat large and should be reduced to $15,000" (R. 1393). This attitude of the trial court is criticized by Associate Justices Stone and Loring in their dissenting opinion in the Supreme Court of Minnesota in these words:

"We come then to the effect of the Federal rule announced in M. St. P. & S. S. M. Ry. Co. *v.* Moquin, 283 U. S. 520, which held that if passion or prejudice enter into the result in any degree the verdict cannot be permitted to stand. The court said, speaking through Mr. Justice Roberts:

> *'Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a victory thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.'*

The rule is peculiarly applicable in a case like this where the question of defendant's liability is a close one due to the fact that connection as cause between the plaintiff's fall and his present condition is so much in doubt and where the defendant's evidence was so persuasive as to convince the trial court that the plaintiff's condition was due to arteriosclerosis (R. 1392).

"*It cannot be said that under the Federal rule, which is much more logical and more just than our own, that the trial court's error was without prejudice to defendant. If passion or prejudice influenced the verdict then defendant was entitled to a new trial on all issues.* It might as well be said that there would be no prejudice where the court

specifically stated in the order that he found passion or prejudice.

"*We are not in accord with the statement in the principal opinion that there is nothing in the record which indicates passion or prejudice. As in the first trial counsel was careful to bring out the fact that plaintiff's wife was in poor health. He also endeavored in his closing argument to invoke action by the employes' grievance committee against one of defendant's material witnesses, obviously for the purpose of arousing prejudice in the minds of the jury. We do not think a court's finding that there was prejudice could be upset on this record and verdict. The situation was such that the sympathies of the jury were likely to be aroused and the effect upon the jury's verdict was commented upon in the previous opinion in this case by a unanimous court.* Passion or the sympathy which results in prejudice is not apt to be disclosed by the cold record, and usually, as this court said in Nelson *v.* West Duluth, supra, the size of the verdict is the best indication of whether or not it was the result of a fair and impartial trial" (R. 1419-1421). (Italics ours.)

The vigorous dissent above quoted from is strictly in accord with the decision of this Court in the case of *M. St. P. & S. S. M. Ry. Co.* v. *Moquin,* 283 U. S. 520, 75 L. Ed. 1243.

The same rule was applied in *N. Y. C. R. R. Co.* v. *Johnson,* 279 U. S. 310, 73 L. Ed. 706, where judgment for an injured passenger against a railroad company was reversed because counsel's argument to the jury "so plainly tended to excite prejudice as to be ground for reversal". The court based that decision on the "paramount consideration" that the State is concerned that litigation be "fairly and impartially conducted". It was held to be the duty of the Court on its own motion to "protect suitors in their

right to a verdict uninfluenced by the appeals of counsel to passion and prejudice".

Enforcement of that principle by this Court would seem particularly appropriate in order to secure uniformity in cases arising under the two Federal Acts here involved. Plaintiffs in like cases would otherwise choose the forum of courts tolerant of appeals to passion and prejudice.

The opinion of the dissenting Justices of the Minnesota Supreme Court in the case at bar is also in accord with the principle adopted in *Arkansas Cattle Co.* v. *Mann*, 130 U. S. 69, quoted as follows:

> "Where the circumstances clearly indicate that the jury were influenced by prejudice * * * that remedy (remission of part of the damages) cannot be allowed. *Where such motives or influences appear to have operated, the verdict must be rejected, because the effect is to cast suspicion upon the conduct of the jury and their entire finding.*" (Italics ours.)

Previous Minnesota decisions are in accord with the last quoted view of this Court. *Masteller* v. *G. N. Ry. Co.*, 100 Minn. 236; *Ewing* v. *Stickney*, 107 Minn. 217; *Roemer* v. *Schmidt Brewing Co.*, 132 Minn. 399; *Flanery* v. *C. M. & St. P. Ry. Co.*, 158 Minn. 384; *Westover* v. *C. M. St. P. & P. Ry. Co.*, 197 Minn. 194, all held that it is mandatory to set aside such a verdict. In the last cited case the Minnesota court emphasizes this thought in the following words:

> "*In the light of the expression of the Supreme Court in M. St. P. & S. S. M. Ry. Co. v. Moquin, 283 U. S. 520, 51 S. C. T. 501, 75 L. Ed. 1243, we think the verdict is vitiated on all issues by passion and prejudice and that on that account the order granting a new trial must be modified so that the case will be resubmitted on all issues.*" (Italics ours.)

That petitioner did not have a fair trial of the issue of its negligence is no mere matter of procedure not involv-

ing substantive right. The judgment here sought to be reviewed is based upon a verdict arrived at by appeal to sympathy, passion and prejudice. In that respect it deprives petitioner of its property without due process of law. The United States statutes relied upon by respondent are fundamentally perverted when passion and prejudice against a railroad are substituted for an impartial finding of negligence without the existence of which the law contemplates no liability whatever.

Respectfully submitted,

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May 8, 1940.